76-4954

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO.

KAKE–TV AND RADIO, INC.,

Petitioner,

vs.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION,

Respondents,

AIRCAPITAL CABLEVISION, INC. AND THE CITY OF WICHITA, KANSAS,

Intervenors.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR CERTIORARI

KAKE—TV and Radio, Inc. ("KAKE"), Petitioner herein, respectfully prays that this honorable court issue a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit in the above-captioned matter, seeking review of a decision of that court. The Court of Appeals affirmed a decision of the Federal Communications Commission which granted a Certificate of Compliance to Air-Capital Cablevision, Inc. authorizing it to institute cable

television service in the City of Wichita, Kansas. In so doing, the Commission refused to decide issues presented by Petitioner that the franchise issued to AirCapital by the City of Wichita is invalid under state law and even if valid, did not become effective until 1972, with substantive consequences. The Court of Appeals upheld the Commission's unwillingness to address these issues even though the Commission is the only forum in which they can be determined. This case thus presents an important question concerning the administration by the Federal Communications Commission of a uniform national communications policy.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 537 F.2d 1121 (1976) and is reproduced at Appendix A. The Memorandum Opinion and Order of the Federal Communications Commission released on July 18, 1975, in File No. CAC-1402, Code No. KS080, and entitled "In Re Application of AirCapital Cablevision, Inc., Wichita, Kansas, for Certificate of Compliance" is reported 54 FCC 2d 173 (1976). The Commission's Decision is reproduced in Appendix B.

JURISDICTION

The jurisdiction of this court is invoked under 28 USC 1254(1).

QUESTION PRESENTED

Whether the Federal Communications Commission may refuse to decide the validity of a cable television franchise under state law where the decision is indispensable to the Commission's exercise of its regulatory functions under the Communications Act and state judicial standards do not provide a procedure for reviewing the validity of the franchise.

STATUTES AND REGULATIONS INVOLVED

The issue in this case arises generally under the Communications Act of 1934, as amended, 47 USC §1 *et seq.*, this court's decision thereunder, and §§76.11 and 76.31 of the Rules and Regulations of the Federal Communications Commission (47 CFR 76.11 and 76.31). Copies of such regulations are set forth in Appendix C to this petition.

STATEMENT OF CASE

This case raises a novel and important question relating to the administration by the Federal Communications Commission of a uniform national communications policy as applied to cable television operations. In brief, the Commission has here authorized cable television services to be instituted in the City of Wichita even though there has not been a determination whether the local franchise, which is a condition precedent to the institution of such service, is valid. This result comes about because the Commission has refused to even consider the validity or the effective date of the AirCapital franchise under Kansas State law. It takes this position as a matter of policy, stating that it will not become "embroiled" in matters of local law. Petitioner had earlier attempted but was unable to secure a determination of the validity of the franchise here in dispute in the state courts. Those courts found KAKE lacked standing under state standards, but stated the expectation that the questions of the validity and effective date of the local franchise would be "well and fully aired" by the Commission, in the discharge of its duties.

In view of the inability of the state courts and the refusal of the Commission to decide these issues on the merits, there exists an extraordinary regulatory "void" which threatens a breakdown of a uniform system of cable television regulation and operation. The important policy

question thus presented — which has not before been considered by this court — is whether the Federal Communications Commission may refuse to decide a question under state law where the answer to that question has a direct and immediate impact upon the effectuation of its regulatory program to maintain a uniform national communications policy and it is the only available forum in which that determination can be made.

FACTS

The proceedings in this matter are complex, involving three separate appeals to the Kansas State Supreme Court, two of which held that the City of Wichita's earlier franchise attempts were invalid and the third of which, upon petition by KAKE, found that KAKE lacked standing in the state courts but referred the question of the validity and effective date of the most recent franchise to the Federal Communications Commission. The chronology of events is recited in the Commission's decision below. (Appendix B.)

A. *Proceedings Resulting in the Issuance of a Franchise.* In September 1966, the City of Wichita enacted an enabling ordinance 28-882, which required anyone wishing to provide cable television service in Wichita to secure a franchise from the city therefor. Before the City of Wichita had an opportunity to award a franchise, Community Antenna TV of Wichita, Inc. — a potential franchise applicant — sued the City of Wichita alleging the unconstitutionality of Ordinance 28-882 under the Kansas Constitution. The Kansas State District Court (unreported decision) found that the franchise fee payments required to be made to the city by a franchise under the ordinance were purely revenue measures and were unconstitutional and void.

Community Antenna appealed to the Kansas State Supreme Court. On June 13, 1970, that court held that

although some of the provisions of the ordinance might be sustainable under the police power, the provisions were so infected by invalid requirements that the entire ordinance was unlawful. The court thus concluded that the City of Wichita is "without an ordinance regulating CATV service." *Community Antenna TV of Wichita v. City of Wichita,* 205 Kan 537, 471 P.2d 360 (1970).

During the pendency of this appeal to the Supreme Court of Kansas, the City of Wichita granted a franchise to Air-Capital Cablevision, Inc., to become effective on April 5, 1969 (Ordinance 30-413). It purported to act pursuant to the contested enabling ordinance. As a result of the Kansas State Supreme Court decision, however, the City of Wichita evidently concluded that both the enabling ordinance and the franchise thertofore issued to AirCapital were invalid. In any event, in September 1970, the city repealed Ordinance 28-882 and placed on first and second reading another ordinance (unnumbered) designed to correct the deficiencies of the earlier one and to accord AirCapital a new franchise. This attempt also reached the Kansas State Supreme Court when challenged by the competing franchise applicant, Community Antenna TV of Wichita.[1]

In its second decision issued April 8, 1972 on the Wichita franchise attempts, the Kansas Supreme Court affirmed its original conclusion that payments to the city under the 1966 Wichita enabling ordinance and first attempted franchise were unconstitutional. However, the court noted that

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[1] Procedurally the second appeal to the Kansas Supreme Court involved a contempt proceeding instituted by Community Antenna TV of Wichita, Inc.; that company contended that the city's proposed issuance of the new franchise would violate the Kansas Supreme Court's earlier determination that the enabling ordinance in the 1969 franchise were unconstitutional. The trial court enjoined the city from enacting certain of the provisions contained in the proposed unnumbered ordinance. The city appealed to the Kansas State Supreme Court.

two significant events had occurred while the second appeal was pending before it. First, the Kansas Legislature in March 1972 had enacted legislation authorizing cities within Kansas to franchise cable television operations (KSA 12-2001, *et seq.*). Secondly, in the interim, the FCC adopted comprehensive regulations governing cable television, including specific standards regulating the issuance by local authorities of cable television franchises; and requiring FCC approval of the franchising process before cable television service may be initiated. These regulations became effective on March 31, 1972. Therefore, although affirming its original conclusion, the Kansas State Supreme Court otherwise vacated its first decision, stating that "in view of the new legislation and regulations promulgated on the entire subject directions . . . become inappropriate." *Community Antenna TV of Wichita Inc. v. City of Wichita*, 209 Kan. 191, 495 P.2d 939 (1972).

B. *KAKE's Attempts to Secure a Determination of the Validity of the Franchise.* Following the Kansas State Supreme Court second decsion, the City of Wichita made its final attempt to issue AirCapital a franchise. On August 29, 1972, it issued Ordinance 32-325 declaring AirCapital to be the franchisee of a non-exclusive franchise.[2] On October 16, 1972, AirCapital filed, as it was required to do under the newly enacted FCC regulations, an Application for Certificate of Compliance with the FCC.

KAKE—TV and Radio, Inc. contested these actions at both state and federal levels.[3] It filed in state court a Motion for Declaratory Ruling to determine the validity of

[2] The August 1972 ordinance is nothing more than a slightly modified version of the proposed unnumbered franchise.

[3] KAKE is the licensee of Television Station KAKE-TV, Wichita, Kansas.

Ordinance 32-325. It contended, among other things, that the franchise did not comport with state law because it had been awarded initially on the basis of a bidding contest in which AirCapital was the highest bidder and that award of franchise had merely been renewed by Ordinance 32-325 on the same grounds. On December 27, 1972, the Kansas State District Court dismissed KAKE's petition, stating that it did not have standing to maintain the action. The District Court did not pass upon the merits of the case.

KAKE appealed to the Kansas Supreme Court. On December 8, 1973, the Kansas Supreme Court affirmed the judgement of the District Court dismissing KAKE's petition for lack of standing. The Kansas Supreme Court, however, took an extraordinary step: it held that although it was not able to decide the issue of validity of Ordinance 32-325, there was nevertheless a forum available to KAKE in which that issue could, and the court expected it to be, determined. The Kansas Supreme Court noted that AirCapital's Application for Certificate of Compliance, grant of which was necessary before cable service could be instituted, was pending before the FCC; the court further pointed out that the substantive objections raised by KAKE in the state litigation " . . . have been repeated in objections which had been filed to AirCapital's application for certificate of compliance . . . " The Kansas State Supreme Court said that it was "satisfied" that those objections to Ordinance 32-325 would " . . . be well and fully aired at the hearing . . ." before the Commission. *KAKE TV and Radio, Inc. v. City of Wichita*, 213 Kan. 537, at 546 (1973).

KAKE had indeed filed objections with the Commission to a grant of AirCapital's Application for Certificate of Complaince. Because such Petition to Deny was required to be filed while KAKE's state litigation was still pending, KAKE initially took the position that the Commission should abstain from any decision pending a final outcome

of the litigation in the state courts; it cautioned the Commission that, in the absence of a determination by the state courts, it would ask the Commission to itself decide whether Ordinance 32-325 granting AirCapital a franchise was valid under state law and, if so, when it became effective.[4] Following the Kansas State Supreme Court's decision, KAKE renewed its objections before the FCC. KAKE particularly contended that the franchise violated KSA 12-2001 because it involved the grant of a franchise to the highest bidder in a bidding contest and was enacted without proper notice or hearings and without consideration of the legal, technical and other qualifications of the applicant. KAKE further contended that even if the franchise were valid, it did not become effective until August 29, 1972, with the enactment of Ordinance 32-325, and violated the Commission's cross-ownership rule. (See footnote 4, *supra.*) KAKE sought hearings before the Commission on both of these interrelated issues.

C. *The Decisions of the Commission and of the Court of Appeals.* On July 18, 1975, the FCC issued its Memoran-

[4] The effective date is of substantive significance under the Commission's rules regarding the permissible cross-ownership of television stations and cable television systems in the same service area. Section 76.501 of the FCC rules (47 CFR 76.501) provides that after July 1, 1970, an entity owning a television station may not acquire an interest in a cable television system within the station's designated service area; such commonly-owned television stations and cable television systems existing prior to July 1, 1970 are grandfathered. The rule is of significance in the instant case because Kansas State Network, Inc., licensee of Station KARD-TV, Wichita, Kansas, has, through a voting trust, a 35% interest in AirCapital. If, therefore, AirCapital's franchise became effective under state law on February 4, 1969, when the first attempt at franchising was made, the cross-ownership interest might be considered grandfathered. If, however, the franchise did not become effective under state law until Ordinance 32-325, the Commission was obligated to consider the application of its own cross-ownership rule to the case. See discussion, *infra.*

dum Opinion and Order granting AirCapital's Application for Certificate of Compliance (Appendix B). It concluded that "our stated postion is to avoid becoming embroiled in the interpretation of state and local laws." Recognizing that the validity of the franchise and its effective date were contested, the Commission asserted, nevertheless, that it would not "'freeze' cable development where a legal dispute over the operative date of a franchise is unresolved." In the very next sentence it concluded that "the franchise issued AirCapital on February 4, 1969 is valid." The only apparent basis for this finding is the absence of a contrary determination by the Kansas State courts (54 FCC 2d 175). Upon the same reasoning, the Commission determined that the cross-ownership interests of Kansas State Network, Inc. is grandfathered under the provisions of Section 76.501(b) because the franchise deemed valid was issued in 1969.

The Court of Appeals affirmed. It fully recognized that the Commission had refused to decide the validity of Ordinance 32-325 under state law, stating that the Commission had "applied a presumption of validity." This ignores the obvious difficulty that the 'presumption' is untenable in light of the specific and concrete issues raised and the prior pronouncements of the Kansas courts. The court stated that the Commission's refusal to make an affirmative determination of the status of the franchise under state law or of the effective date of the franchise under state law on grounds that it would not become embroiled in the interpretation of local law "is no more than a short description of its policy elsewhere considered." This begs the very question presented, which is whether the Commission may properly adopt such a policy when it is the only forum in which the issues can be decided.

The Court of Appeals thus upheld the Commission's refusal to pass upon the validity or effective date of the operative franchise. It held: "It is not the function of the

FCC to provide a forum to litigate such an issue . . . The petitioner would seem to argue that because the state court would not hear it the Commission should, but this cannot be." Neither explanation nor precedent for this is afforded. (537 F.2d at 1122-1123.)

The Court of Appeals' decision was entered July 9, 1976. The instant Petition for Certiorari ensued.

REASONS FOR GRANTING THE PETITION

This court should review the decision below to clarify the law on a question vital to the administration by the Federal Communications Commission of a uniform, national communications policy. The question whether, in the absence of any other forum, the Commission must decide the validity of cable television franchises with reference to state law is one which touches directly upon the manner and the efficacy with which the Commission carries out an effective program of regulating cable television in the public interest. It is one which has not heretofore been definitively determined, but the decision below is in conceptual conflict with an analogous recent decsion of the Court of Appeals for the District of Columbia.

The question presented has profound policy implications. The Commission's policy may well result in the issuance of federal authorizations to institute cable television service to operators who are not validly authorized under state law to conduct such operations or who have improperly secured such an authorization. The question whether cable television operations are duly authorized will depend entirely upon the accident of state law regarding the standing of interested parties to sue in the courts.

This petition arises out of the on-going efforts of the Commission and this court to establish uniform national standards for the inception and operation of cable

television systems. The Commission first asserted jurisdiction over cable television operations in 1966.[5] This court affirmed the Commission's assertion of jurisdiction in *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), because federal pre-emption of the regulation of cable television is, at least to some extent, "reasonably ancillary", thus integral, to the Commission's discharge of its statutory duties under Section 2(a) of the Communications Act (47 USC §152(a)). In *United States v. Midwest Video Corporation*, 406 U.S. 649 (1972), this court held that the Commission may and, indeed, must exercise jurisdiction over purely local aspects of cable television where necessary in the furtherance of its basic policy objectives.

Pursuant to these criteria, the FCC in 1972 adopted a comprehensive set of regulations controlling and establishing standards for the franchising and operation of cable television systems.[6] The 1972 order for the first time defined the division of regulatory responsibility between the federal, state and local levels of government with regard to cable television operations. In what was characterized as "deliberately structured dualism,"[7] the 1972 order established the general policy of leaving jurisdiction of the award of franchises to local authorities.[8] This action, under the structure of the rules themselves, constitutes a delegation or cessation of authority by the Commission to local governmental entities. But, the regulatory program

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[5] Second Report and Order in Docket No. 15971, 2 FCC 2d 725 (1966).

[6] Report and Order in Docket No. 18397, 36 FCC 2d 143, reconsidered in part 36 FCC 2d 326 (1972).

[7] Report and Order in Docket No. 18397, *supra*, at 207.

[8] *Cf.* McQuillan Municipal Corporations §21.16; City of *Liberal v. Teleprompter Cable Service, Inc.*, 218 Kan. 289, 544 P.2d 330 (Dec. 13, 1975).

clearly contemplated that the local entities would carry out their responsibilities subject to federal oversight by the Commission. Thus, Section 76.11 of the rules provides that the issuance of a franchise by local franchising authorities is not sufficient and that before cable television service is instituted, the proposed operator must additionally receive a Certificate of Compliance from the FCC upon appropriate application therefore; and Section 76.31(a) of the Commission's rules provides that in order to receive a Certificate of Complaince, the "franchise or other appropriate authorization" issued by the local authority must conform to prescribed conditions and must have been issued in a manner which conforms to accepted standards of due process.

In enacting such regulations, the Commission has conditioned indispensable grant of federal authority (in the form of the Certificate of Compliance) on the proper and lawful exercise of state authority (the issuance of the franchise). Indeed, the Commission itself recognized its statutory duties require it to review and pass upon the actions of local franchising authorities to whom initial jurisdiction had been conferred. When it adopted these regulations, the Commission said:

> because of . . . our own obligation to insure an efficient communications service with adequate facilities and reasonable charges, we must set at least minimum standards for franchises issued by local authorities. These standards relate to such matters as *the franchise selection process* . . . .[9]

[9] Cable Television Report and Order in Docket No. 18397 at p. 207 (emphasis added).

The narrow but fundamental question presented to this court is whether the Commission may cede limited jurisdiction to local governmental entities and thereafter, as a matter of policy, refuse to exercise oversight which is necessary to "insure an efficient communications service with adequate facilities at reasonable charges." This case does not involve a conflict of federal and state power between the FCC and the State of Kansas as to which one will determine the validity of the franchise issued to AirCapital. This case is one in which the state has declined to decide the validity of the franchise or its effective date on procedural grounds and the Commission is the only forum in which that question can be determined. The effect of the Commission's action in refusing, as a policy matter, to determine the validity and effective date of the AirCapital franchise is to create a legal vacuum or no man's land in which cable television operates unregulated.

We submit that this court, in upholding the Commission's jurisdiction over cable television, did not intend the creation of such a vacuum. If cable television regulation is integral to the effectuation of the policies of the Communications Act, there is no basis for the FCC to cede partial jurisdiction to local entities and leave such entities free to authorize franchises, the validity of which can be tested in no forum. Certainly, the Kansas State Supreme Court did not contemplate that merely because it was unable to reach the merits of KAKE's challenge to the validity of Ordinance 32-325 the issues would go undecided. It took the most unusual step of pointing out that there was a forum for determination of these issues and pronounced itself "satisfied" that the question of validity and of effective date would ". . . be well and fully aired at the hearing . . ." and would be given "due attention" by the FCC. While we do not doubt that the Commission may, consistent with *Midwest Video Corporation, supra,* delegate initial jurisdiction

for the issuance of franchises to local authorities, it seems equally clear that, in the absence of a definitive determination of an issue of state law integral to the Commission's proper exercise of its responsibilities, the Commission itself must decide the matter.

We submit, therefore, that the governing principle may be simply stated: when, as here, the Commission is the only forum in which the state law issues are pending and when the state law issues are interrelated to the matter before the Commission, then the Commission must itself decide such issue. The Court below expressed doubts as to the Commission's ability to decide questions under state law. This is a task which regularly falls to federal courts sitting in diversity. It is, moreover, one which the Commission has itself exercised in its regulation of broadcasting under the Communications Act. The Commission has repeatedly found that circumstances arise in which, in furtherance of its statutory duties it must decide questions of state law and it has done so.[10]

We equally maintain that the question of the validity of the franchise issued to AirCapital (or any other franchisee) under state law is integral to the Commission's exercise of its regulatory responsiblitiies with regard to the development of an orderly and effective cable television industry. In *TelePrompter Cable Systems, Inc. v. FCC*, Case No. 75-1582, decided August 26, 1976, the Commission asserted the right to reject the findings of a local franchising authority that the successful franchisee possessed the

[10] See *Pottsville Broadcasting Co. v. Federal Communications Commission*, 98 F.2d 288 (CADC 1938); *A. Knight Message Radio Corp.*, 26 FCC 2d 911 (1971); *North American Broadcasting, Inc.*, 15 FCC 2d 979 (1969).

requisite legal, character and other qualifications, because the successful applicant had earlier received a renewal of franchise in the same community as the result of corrupt practices. The Commission asserted this authority even as to matters which occurred prior to the adoption of its 1972 regulatory scheme. Although the Court of Appeals held that the Commission lacked authority to base its determination upon local actions taken prior to 1972, it made plain that local franchising decisions are inextricably related to the Commission's proper exercise of its responsibilities in the regulation of cable television. The court said that acceptance of the Commission's position involved two propositions:

> First, that local franchising decisions are so integrally related to the federal regulatory scheme that any corruption of the local process impacts upon the federal scheme as well; secondly, that this is true even when the corruption of the local process *preceded* the establishment of the federal regulatory scheme. We agree with the first proposition, and believe that the *Root Refining* doctrine may justify FCC refusal to award a Certificate of Compliance to a franchisee who has obtained his franchise through corruption of the local franchising process,[11] but we reject the second.

[11] Of course, the existence of the due process hearing requirement in Section 76.31(a)(1) provides an alternative basis for refusing a Certificate of Compliance in such instances.[11]

In its conclusion, the court particularly emphasized the import of its holding. It stated that its denial of authority to set aside the action of the local franchising authority in that case "does not mean that the Commission is forced to

[11] Slip Opinion, p. 13.

award a Certificate of Compliance with the local franchise process, is tainted by bribery or other corrupt practices. The due process requirement of Section 76.31 prevents this result by authorizing non-certification of franchisees where local proceedings do not comport with due process" (Slip Opinion, P. 16).

By parity of reasoning, when it is the only available forum, the Commission may and should determine the validity of a franchise issued by local authorities with reference to state law and, if valid, its effective date, as a matter of due process under Section 76.31. Certainly, the validity of the franchise under state law is, no less than corrupt practices and bribery, a matter of due process, "integrally related" to the federal regulatory scheme. Although the subject matter is different, it is difficult to reconcile the expansive view of the Commission's duty, under its own regulatory scheme, to decide state and local issues taken in *Teleprompter supra.* with the narrow view of the Commission's obligation taken in this case below.

The Court of Appeals below suggested that the Commission could satisfy its obligation merely by invoking a presumption of validity. We may concede that such a presumption is appropriate where the validity of the franchise is not challenged or where the claims of validity are palpably frivolous. Section 76.27 (47 CFR 76.27) Cf. 47 U.S.C. 309(d). That is decidedly not the case here and it is irrelevant that the Commission may have used such a presumption in other cases. See *General Communications and Entertainment Co.*, 41 FCC 2d 501 recon. denied, 45 FCC 2d 309 (1973). In two successive opinions, the Kansas State Supreme Court itself held that the award of a franchise to AirCapital contravened the Kansas State Constitution because the selection process was predicated solely upon a grant to the highest bidder. Whether AirCapital received the franchise constituting Ordinance 32-325

because of its prior history as the highest bidder, as KAKE contends, or whether AirCapital received it for other reasons, as AirCapital maintains, is vital to a determination of its validity under Kansas law and the Commission's rules. The conflict was clear and neither the Court nor the Commission suggested it was an insubstantial issue. Of equal substance is the question of the date upon which the franchise became effective, if at all. Nevertheless, the Commission chose to avoid both issues entirely, stating that it would not become "embroiled" in disputes with reference to state law and thereafter presuming that the February 4, 1969 franchise "is valid." The Court of Appeals' conclusion that this approach is a matter of Commission policy merely begs the question which we ask this court to decide: whether the Commission may properly refuse to decide on the merits substantial issues of state law which are integrally related to the exercise of its regulatory functions when it is the only forum in which those issues can be determined.

Unless this court agrees to hear and resolve this narrow, but fundamental, question, serious consequences to the Commission's policy of "deliberately structured dualism" may ensue. At best, the Commission and litigants will be left in considerable uncertainty as to the extent of the Commission's duties because of the conceptual conflict between the decision in *TelePrompter, supra,* and the decision below. Arbitrary and inconsistent administrative decisions can only result. At worst, the Commission will continue the policy enunciated for the first time in this case that it will not decide substantial questions under state law and will grant authorization to institute cable service even in the absence of such a decision. In such circumstances, the importance of a valid franchise will be made to depend entirely upon the vagaries of state law with respect to standing: in those states where an expansive view of standing

exists, the validity of the franchise will be of substantial importance in securing federal authority to institute cable service because the validity can readily be determined at the state level; in those, such as Kansas, which take a restrictive view of parties who may challenge local governmental action in the state courts, the validity of the franchise is rendered unimportant so long as the applicant before the Commission holds some form of authorization because, in such cases, the state courts cannot decide and the FCC will not. Such a result may be dualism, but it is neither deliberate nor structured.

The court below suggests that this dichotomy of standards for eligibility to operate a cable television system is without significance because, even in the present case, the validity of AirCapital's franchise "can be decided in the Kansas courts between the proper parties." (537 F2d at 1123) We submit that this is simplistic. If a litigant with standing in the Kansas courts were now to come forward — which seems unlikely — a determination by the Kansas courts that the franchise is invalid would only produce the very result which the Commission sought to avoid, profound uncertainty as to cable television operations in Wichita. The solution offered by the Court of Appeals is thus impractical and would have the effect of disrupting the orderly and sensible evolution of cable television.

We recognize that there are in our system of jurisprudence occasional voids where, for want of standing or other reason, a decision on the merits cannot be reached. Where uniformity is not thought to be essential, it may be appropriate to allow a regulatory void or lacunae to exist. *Cf. Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 772 (1947). But, we are here dealing with a federal regulatory commission charged with the orderly development of nationwide policy of a vitally important matter in the public interest. It is an area in which

uniformity of standards nationwide is of paramount importance. In those circumstances, we submit, the agency may not refuse to decide a matter with reference to state law where that issue is substantial and indispensable to the agency's own exercise of its regulatory functions and where it is the only forum for doing so. Certainly, we submit, this is an issue which merits the attention of this court.

CONCLUSION

For these reasons, it is respectfully requested that the instant Petition for Certiorari be granted.

Respectfully submitted

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Counsel to Petitioner

October 6, 1976

CERTIFICATE OF SERVICE

This will certify that, pursuant to the Rules of the Supreme Court of the United States, the undersigned, a member of the Bar of the Supreme Court, has caused the foregoing Petition for Writ of Certiorari to be served upon the parties listed below at the addresses indicated therein:

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APPENDIX A

KAKE—TV AND RADIO, INC.,
Petitioner,

v.

UNITED STATES of America and Federal Communications Commission,
Respondents,

No. 75-1666.

United States Court of Appeals,
Tenth Circuit.

Submitted May 19, 1976.

Decided July 9, 1976

Mark H. Adams and Floyd E. Jensen, Wichita, Kan. (Paul Dobin and Ian D. Volner of Cohn & Marks, Washington, D.C., on the brief), for petitioner.

Julian J. Rush, Jr., Counsel, F.C.C., Washington, D.C. (Thomas E. Kauper, Asst. Atty. Gen., and Robert B. Nicholson, Atty., Dept. of Justice, Ashton R. Hardy, Gen. Counsel, and Daniel M. Armstrong, Associate Gen. Counsel, F.C.C., Washington, D.C., on the brief), for respondents.

Gerald Sawatzky, Wichita, Kan. (Robert C. Foulston, Wichita, Kan., Alan Y. Naftalin and Margot S. Humphrey, Washington, D.C., on the brief), for intervenor, AirCapital Cablevision, Inc.

John Dekker, Wichita, Kan., on the brief for intervenor, City of Wichita, Kansas.

Before SETH and HOLLOWAY, Circuit Judges, and TEMPLAR, Senior District Judge.

SETH, Circuit Judge.

The petitoner, KAKE—TV and Radio, Inc. brought this proceeding to review orders of the Federal Communications Commission. The Orders were entered on the application of AirCapital Cablevision, Inc. for certification to enable it to commence cable television service in Wichita. The orders granted such authority.

The Commission did not hold hearings on the application, but received documents, statements of position, objections, and other data supporting or opposing the granting of the certificate of compliance. (47 C.F.R. 76.11(a).) The petitioner KAKE appeared and opposed the application on several grounds.

This proceeding represents one of several challenges made to the franchise which AirCapital received from the City of Wichita in 1969 to install and operate a cable television system. It is not neccessary to detail the antecedent litigation and legislative acts. It is sufficient to say that a franchise was granted in 1969 and amended in 1972 which was contested in the state courts, but no decision there now remains holding it to be invalid.

KAKE—TV and Radio, Inc., here urges that the franchise is invalid, and that the Federal Communications Commission, in the proceedings relative to the certification of the franchise holder, should have had a formal hearing on the question of validity of the franchise. It also argues that AirCapital is not in substantial compliance with the Commission regulations.

The objection of KAKE in the Commission proceedings was filed at a time when KAKE was pressing legal proceedings in the Kansas state courts challenging the validity of the franchise. KAKE in its objection filed with the Commission then urged that the franchise issue was a

local matter to be decided by the state courts. However, during the pendency of the Commission proceedings, the Kansas Supreme Court decided that KAKE did not have an interest in the franchise issue sufficient to enable it to litigate the question, and dismissed the action. KAKE now takes the position that the validity issue should be decided by the Commission in a full-scale hearing.

The order of the Commission here reviewed granting authority to AirCapital to begin operation recites the factors and material considered by the Commission relative to the franchise validity matter, and other matters. The chronology of the events is set forth, and particular matters were considered separately. The Commission noted that public hearings had been held by the city before it granted the franchise, that the Ordinance No. 30-413 had not been set aside by the courts, that the City formally advised the Commission that the franchise was valid and in effect. Also, the Commission noted that the Kansas Supreme Court had held that cities in Kansas did not have authority to franchise cable television, and voided Wichita's enabling ordinance (28-882) but the Kansas legislature had passed an act validating cable television franchises theretofore granted. The Commission considered other cases relative to the issue, but found none which invalidated the basic ordinance nor were there statutes or rulings with such consequences. The Commission applied a presumption of validity in these circumstances and determined that the 1969 franchise was valid for its purposes and to the extent it exercised its authority on that subject. It refused to go further, and stated that there was "substantial compliance" as contemplated in the regulations.

The Commission met the requirements of *SEC* v. *Chenery Corp.*, 332 U.S. 194, 67 S.Ct. 1575, 1560, 91 L.Ed. 1995; *Burlington Truck Lines v. United States,* 371 U.S. 156, 83 S.Ct. 239, 9 L.Ed.2d. 207, and *NLRB v.*

Metropolitan Life Ins. Co., 380 U.S. 438, 85 S.Ct. 1061, 13 L.Ed.2d 951 in the disclosure of the basis of its decision in order that an effective review may be had.

The Commission stated that it did not intend to become involved in a dispute as to the validity of the franchise; that the matter on the record was clear enough to enable it to proceed; and that there was a need to act so that service could be provided. The petitioner would make much of the statement by the Commission that it would not become "embroiled" in the interpretation of local law, but it is no more than a short description of its policy elsewhere considered. It did make the necessary determination of the issues, including this one.

[1] KAKE argues that the fee to the City provided in the franchise was too high to permit substantial compliance. This however, we view to be a matter within the discretion of the Commission. The record shows that the interested parties planned a downward revision, and also a review in 1977. We also find no merit in the cross-ownership issue advanced by those contesting the application, nor of the "highest bidder" objection.

[2,3] The Commission recites and reveals in the orders the basis for its decision. The statute (47 U.S.C.§ 309(e)) does not require a hearing on cable applications. We so held in *Conley Electronics Corp. v. F.C.C.*, 394 F.2d 620 (10th Cir.). The Commission had developed the facts fully in the proceedings, and it then applied the regulations to such facts. See *Hartford Communications Committee v. F.C.C.*, 151 U.S. App. D.C. 354, 467 F.2d 408. The argument for a full hearing made by KAKE is directed to the franchise validity issue and is apparently urged because the Kansas courts would not hear KAKE on the issue. If there is a defect in the franchise not revealed in the filings in the certification case, the matter can be decided in the

Kansas courts between the proper parties. It is not the function of the F.C.C. to provide a forum to litigate such an issue, and, furthermore, the Commission is not a tribunal equipped to do so. See *Eagle Broadcasting Co. v. F.C.C.*, 169 U.S.App.D.C. 16, 514 F.2d 852 and *Committee v. F.C.C.*, _____ F.2d _____ (D.C. Cir.). The facts that the Kansas court refused to hear the case of KAKE is of no significance here. The petitioner would seem to argue that because the state court would not hear it the Commission should, but this cannot be.

The decision of the Commission is in all aspects affirmed.

APPENDIX B

FCC 75-792

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In Re Application of
AIRCAPITAL CABLEVISION, INC., WICHITA, KANS. — CAC—1402 KS080
For Certificate of Compliance

Memorandum Opinion and Order

(Adopted July 2, 1975; Released July 18, 1975)

BY THE COMMISSION:

1. AirCapital Cablevision, Inc. has filed the above-captioned application for a certificate of compliance to commence cable television service in the city of Wichita, Kansas, located within the Wichita-Hutchinson Kansas, major television market (#67). The applicant proposes to carry the following television broadcast signals on the system:

KARD—TV (NBC, Channel 3) Wichita, Kansas
KAKE—TV (ABC, Channel 10) Wichita, Kansas
KTVH—TV (CBS, Channel 12) Hutchinson, Kansas
KPTS (Educ., Channel 8) Hutchinson, Kansas
KBMA—TV (Ind., Channel 41) Kansas City, Missouri
KWGN—TV (Ind., Channel 2) Denver, Colorado

AirCapital's proposed signal carriage is consistent with Section 76.63 of the Commission's Rules as it relates to Section 76.61. KAKE—TV and Radio, Inc., licensee of Station

KAKE—TV, has filed an objection to AirCapital's application. KAKE—TV claims that the city of Wichita's Ordinance No. 32-325 which KAKE claims grants AirCapital a franchise is not in struct compliance with Section 76.31 of the Rules.[1] Additionally, KAKE—TV claims that the Kansas State Network, Inc., owns 35 percent of AirCapital's stock and is also the licensee of Station KARD—TV and this ownership combination is in violation of the cross-ownership provisions of Section 76.501 of the Rules.[2]

FRANCHISE ISSUE

2. A list of dates and the corresponding legislative or judicial acts relating to the attempts to franchise AirCapital's proposed cable operations is contained in the attached appendix. From the events detailed in the appendix there are six that are crucial to the resolution of the issues herein: (1) the city of Wichita's enactment of Ordinance 28-882 on September 20, 1966, setting forth the requirement of securing a franchise for the operation of a cable television system in Wichita; (2) the passage of Ordinance 30-413 on February 4, 1969, granting a franchise to AirCapital Cablevision, Inc.; (3) the Kansas Supreme Court's opinion in *Community Antenna Television of Wichita, Inc. v. City of Wichita et al.*, 205 Kan. 537, 471 P2d 360 (1970), holding

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[1] Section 76.31 recites the provisions that the applicant's franchise or other appropriate authorization must contain.

[2] Section 76.501(a) reads in applicable part: No cable television system . . . shall carry the signal of any television broadcast station if such system directly or indirectly owns, operates, controls, or has an interest in:

(1) . . .
(2) A television broadcast station whose predicted Grade B contour . . . overlaps in whole or in part the service area of such system . . .
(3) . . .

Ordinance 28-882 void and unenforceable;[3] (4) the action of the city of Wichita on September 1, 1970, repealing Ordinance 28-882; (5) the passage of Kansas Senate Bill No. 499 effective March 24, 1972, giving Kansas cities the authority to franchise cable television systems and validating all pre-existing municipal ordinances purporting to authorize cable television service;[4] and, (6) the passage of Ordinance 32-325, amending Ordinance 30-413, and reaffirming the grant of a cable television franchise to AirCapital Cablevision, Inc.[5]

3. KAKE—TV and Radio, Inc.'s "Petition to Deny" claims that AirCapital's original franchise (Ordinance 30-413) cannot stand without Ordinance 28-882, the enabling legislation pursuant to which that franchise was issued. Therefore, KAKE asserts, Ordinance 32-325, passed

[3]The city of Wichita attempted to regulate cable television through its police power. At page 537 the court stated, "The home rule amendment in broadening the powers of municipalities did not extend to them the power to enact unreasonable ordinances under the guise of police power." Later the court held, "An ordinance which attempts to force a private commercial enterprise to submit to regulation as a public utility before it can do business in the city is unreasonable and void."

[4]Section 7 of Kansas Senate Bill No. 499 (Kansas Statutes Annotated 12-0006, *et seq.*) reads as follows:

> All ordinances and existing franchises purporting to authorize persons or entities to provide cable television service in said cities shall hereinafter be deemed to be authorized and operative under the provisions of this act.

[5]Ordinance 32-325 is titled: "An ordinance amending Ordinance No. 30-413 of the City of Wichita, Kansas, granting a franchise to AirCapital Cablevision, Inc., to construct, operate and maintain a community antenna television system within the city of Wichita: Providing terms and conditions for the operation of such systems: providing fees therefor."

August 29, 1972, and purporting to be an amendment to Ordinance 30-413 is not an amendment but, in reality, a new franchise. Therefore, since Ordinance 32-325 was enacted subsequent to the effective date of the Commission's new cable television rules on March 31, 1972, it must comply strictly with the provisions of Section 76.31 of the Rules. It fails to comply with these requirements, KAKE claims, in three respects: (1) the ordinance calls for a franchise fee of 7½ percent of gross annual receipts of the grantee; (2) the ordinance was passed without appropriate statutory authorizations and therefore was enacted without a proper public notice or hearing to pass on the legal, technical, character, financial and other qualifications of the applicant; and, (3) the ordinance involves the grant of the franchise to the highest bidder.

4. AirCapital attempts to rebut the allegations of KAKE by claiming that Ordinance 32-325 is indeed an amendment to Ordinance 30-413 and the requirements of Section 76.31 of the Rules do not apply to its passage. Also, since Ordinance 30-413 was passed prior to March 31, 1972, it need not be in strict compliance with Section 76.31 of the Rules.[6] AirCapital argues that even if Ordinance 30-413 could not stand without Ordinance 28-882, which was repealed by the city of Wichita after being declared null and void by the Kansas Supreme Court, the passage of Kansas Senate Bill No. 499 specifically validated all franchises previously issued by municipalities even if issued without statutory or other legal authority. Therefore, AirCapital claims, the sole purpose in the passage of Ordinance 32-325 was to bring AirCapital's franchise in line with the Kansas Supreme Court Opinion and the new statute.

[6]*See e.g., CATV of Rockford, Inc.*, FCC 72-1105, 38 FCC 2d 10 (1972), *recons. denied*, 40 FCC 2d 493 (1973).

5. At the outset we wish to emphasize that our stated position is to avoid becoming embroiled in the interpretation of state and local laws. However, we do not believe we should "freeze" cable development where a local dispute over the operative date of a franchise is unresolved. We are persuaded that the franchise issued AirCapital on February 4, 1969, is valid. An examination of that franchise as well as the subsequent amendment shows compliance with all the provisions of Section 76.31 with the exception of a 7½ percent franchise fee. However, we have previously permitted similar fees in excess of 3-5% for franchises issued prior to our Rules with the understanding, of course, that the franchise must be amended by March 31, 1977 to reduce the fee to 3%. See *CATV of Rockford, Inc., supra.* In this connection we note that on October 3, 1972, the Wichita City Council adopted a resolution assuring that the franchise fee would be reduced to 3% by March 31, 1977. Accordingly, we find the franchise to be in substantial compliance with our Rules and we will grandfather its provisions until March 31, 1977, at which time it must be brought into strict compliance.[7] In reaching this decision we wish to point out three deciding factors: (1) Ordinance No. 30-413 has not been the subject of any litigation nor has the city of Wichita taken any steps to repeal the ordinance;[8] (2) a letter from John Dekker, Director of Law for the city of Wichita expresses the opinion that that office believes that Ordinance 30-413 is legal and valid;[9] and, (3) although the opinion of the Supreme Court of Kansas in *Community Antenna Television of Wichita v. City of Wichita, supra,* indicated that Kansas cities did not have the authority to

[7] *Id.*

[8] All litigation has centered around Ordinances 28-882 and 32-325.

[9] Letter of March 20, 1974, from John Dekker, Director of Law, city of Wichita, to Federal Communications Commission.

franchise cable television operations and therefore voided Wichita's enabling ordinance, 28-882, Kansas Senate Bill No. 499 specifically validated all pre-existing franchises and ordinances purporting to allow persons or entities to provide cable television service.[10]

CROSS-OWNERSHIP ISSUE

6. KAKE-TV and Radio, Inc., in its "Petition to Deny" alleges that since the Kansas State Network, Inc., licensee of Station KARD-TV, owns 35 percent of Air Capital's stock, and places a Grade B or better signal over the community, a prohibited cross-interest in violation of Section 76.501(a) of the Rules exists and there is no basis for grandfathering or waiver. KAKE-TV claims that the fact that the Kansas State Network has placed its stock in a voting trust with the First National Bank of Pratt, Kansas, and is therefore the beneficial but not record controlling stockholder, does not remove the prohibited cross-ownership interest from the scope of the Rules. KAKE states that the legal ownership in this instance is merely "titular or nominal" and the rights and duties of ownership remain with the beneficial interest holder. In cases such as

[10] We note that the Kansas Supreme Court reversed its decision in *Community Antenna TV of Wichita v. City of Wichita, supra,* in *Community Antenna TV of Wichita v. City of Wichita,* 209 Kan. 191, 495 P2d 939 (1972). The court concluded that since Kansas Senate Bill No. 499, which became effective March 24, 1972, declared the furnishing of cable television service to be "a private business affected with such public interest by reason of its use of the public ways, alleys and streets so as to require that it be reasonably regulated by cities," it was impossible for the court to overlook the significance of the bill as a declaration of public policy. That bill, taken with the Federal Communications Commission's rule effective March 31, 1972, forced the court to "acknowledge the overbreadth of our prior holding, premised on the proposition that cable television is a private business unaffected with a public interest."

these, KAKE asserts, the party having the right to determine how the stock will be voted is considered the owner of the prohibited interest according to Commission policy. KAKE argues that in the instant voting trust agreement the Kansas State Network maintains the right to determine how the stock is voted. Finally, KAKE notes that Note 3(c) to Section 76.501(c) discusses the applicability of voting trusts but only to corporations of 50 or more stockholders. KAKE concludes that from available information AirCapital appears to have fewer than 50 stockholders, and to the extent that the note creates an exemption to the cross-ownership prohibition, it would be inapplicable to AirCapital.

7. AirCapital submits two arguments to rebut the assertions of KAKE. First, AirCapital claims that if it is determined that it has a valid franchise issued prior to July 1, 1970, then the provisions of Section 76.501(b) exempting cross-ownership interests as of that date until August 10, 1975 are applicable. Additionally, AirCapital points out the Commission has expressed interest in extending the divestiture date past August 10, 1975. Second, AirCapital states that even if it is determined that its franchise was issued subsequent to July 1, 1970, as a matter of law specifically stated in the voting trust agreement, the bank and not anyone associated with the Kansas State Network, determines how those shares will be voted. However, AirCapital does not address the issue of the number of stockholders in AirCapital and therefore the applicability to this case of Note 3(c) remains unclear.

8. Since we have determined that AirCapital was, prior to July 1, 1970, in possession of a valid franchise, the provisions of Section 76.501(b) are applicable. In the *First Report and Order in Docket 20423*, FCC 75-715, _____ FCC 2d _____ (1975), the Commission has indefinitely

suspended that divestiture date and that action is applicable in the instant situation. We will, however, take this opportunity to declare that unless we receive information substantiating the fact that AirCapital has more than 50 shareholders, we will not consider the provisions of Note 3(c) to Section 76.501 applicable and the cross-owned interest will have to be divested at the date to be determined by the Commission in Docket 20423.

In view of the foregoing, the Commission finds that a grant of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Petition to Deny" of KAKE-TV and Radio, Inc., against the "Application for Certificate of Compliance" (CAC-1402) filed on January 5, 1973, IS DENIED.

IT IS FURTHER ORDERED, That the above-captioned application (CAC-1402) for certificate of compliance filed by AirCapital Cablevision, Inc., IS GRANTED to the extent indicated above and an appropriate certificate of compliance will be issued.

Federal Communications Commission,
Vincent J. Mullins, *Secretary.*

APPENDIX

September 20, 1966	The city of Wichita enacted Ordinance 28-882. This ordinance provided for the necessity of securing a franchise to operate a cable television system, for terms and conditions for the operation of such systems and for fees thereupon.
November 12, 1968.....	Before the city of Wichita had an opportunity to award a franchise, Community Antenna TV of Wichita, Inc., sued the city of Wichita, alleging the unconstitutionality of Ordinance 28-882.

December 15, 1968. . . . . The trial court concluded that Ordinance 28-882 was valid in part and void in part as unconstitutional.

December 17, 1968. . . . . Community Antenna appealed the above ruling to the Supreme Court of Kansas.

February 4, 1969 . . . . . The city of Wichita passed Ordinance 30-413, granting a franchise to AirCapital Cablevision, Inc.

April 5, 1969 . . . . . The above Ordinance took effect.

June 13, 1970 . . . . . The Supreme Court of Kansas filed its opinion in *Community Antenna TV of Wichita v. City of Wichita*, 205 Kan. 537, 471 P2d 360 (1970). It held that the lower court's judgment be reversed with instructions to enter a declaratory ruling holding Ordinance 28-882 void and unenforceable.

September 1, 1970 . . . . . The city of Wichita repealed Ordinance 28-882.

September 8, 1970 . . . . . The city of Wichita placed on first reading another ordinance (unnumbered) designed to correct the deficiencies in Ordinance 28-882.

September 15, 1970 . . . . . The city of Wichita placed the new unnumbered ordinance on second reading.

September 16, 1970 . . . . . Community Antenna filed a motion for citation of members of the city commission to show cause why they should not be found guilty of contempt of court because of the proposed enactment of the unnumbered ordinance which, Community Antenna asserted, was violative of the Kansas Supreme Court's earlier mandate.

September 18, 1970 . . . . . Citation issued and hearing on contempt proceeding was held.

September 21, 1970 . . . . . Trial court, by its own motion, entered an amended journal entry pursuant to the

Kansas Supreme Court's mandate in the action against Ordinance 28-882. The amended order declared that certain provisions of that ordinance went beyond the city's enactment authority and enjoined the city from their enactment by ordinance.

September 25, 1970 . . . . . Trial court issued order finding the Commission not guilty of contempt and dismissed the contempt proceedings.

September 30, 1970 . . . . . City filed motion to modify the September 21, 1970, order of the trial court.

November 19, 1970. . . . . Trial court denied the city's motion to modify.

December 7, 1970. . . . . Kansas State Network, Inc., licensee of Station KARD-TV, Wichita, Kansas, and owner of 35% of the outstanding stock in AirCapital Cablevision, Inc., executed a voting trust agreement with the First National Bank of Pratt, Kansas, whereby KSN retained beneficial ownership of the 35% interest while transferring record ownership to the First National Bank of Pratt.

March 24, 1972 . . . . . Kansas Senate Bill No. 499 (K.S.A. 12-2001 et seq.) took effect. This bill gave Kansas cities the authority to franchise cable television operations and validated all existing franchises.

March 31, 1972 . . . . . Federal Communications Commission's current cable television rules went into effect.

April 8, 1972 . . . . . Kansas Supreme Court filed its opinion in *Community Antenna TV of Wichita v. City of Wichita*, 209 Kan. 191, 495 P2d 939 (1972). The court receded from the position it had taken earlier because of Kansas Senate Bill No. 499 and the new

	FCC rules. It reinstated the trial court's ruling of 1968 declaring only two provisions of Ordinance 28-882 invalid.
August 29, 1972	Unnumbered ordinance changed to Ordinance 32-325 and passed as an amendment to Ordinance 30-413.
October 16, 1972	AirCapital filed its application for a certificate of compliance with the FCC.
November 22, 1972.	KAKE-TV and Radio, Inc., filed, in District Court, a motion for declaratory ruling to determine the validity of Ordinance 32-325.
December 27, 1972.	District Court dismissed KAKE's petition stating it did not have standing to maintain the action.
January 4, 1973	KAKE filed "Petition to Deny" AirCapital's certificate of compliance application with the Federal Communications Commission.
January 24, 1973	KAKE appealed District Court's December 27, 1972, ruling to the Kansas Supreme Court.
December 8, 1973.	Kansas Supreme Court affirmed judgment of District Court dismissing KAKE's petition due to lack of standing.

APPENDIX C

FCC Rules & Regulations

Subpart B — Applications and Certificates of Compliance

§76.11 Certificate of compliance required.

(a) No cable television system shall commence operations or add a television broadcast signal to existing operations unless it receives a certificate of compliance from the Commission: *Provided, however,* That an existing system may add a television signal, pursuant to §§ 76.57(a)(1)—(3), 76.59(a)(1)—(3) and (5), 76.61(a)(1)—(3), or 76.63(a) (as it relates to §76.61(a)(1)—(3)), or the signal of a noncommercial educational television station that is operated by an agency of the state within which the system is located, pursuant to §§ 76.57(b), 76.59(c), 76.61(d), or 76.63(a) (as it relates to §76.61(d)), without filing an application or receiving a certificate of compliance, if the system serves the information required by § 76.13(b)(1) on the Commission and the parties named in § 76.13(a)(6) and (7) at least thirty (30) days before commencing such carriage and no objection is filed with the Commission within (30) days after such service is made. See § 1.47 of this chapter.

(b) No cable television system lawfully carrying television broadcast signals in a community prior to March 31, 1972, shall continue carriage of such signals beyond the end of its current franchise period, or March 31, 1977, whichever occurs first, unless it receives a certificate of compliance.

(c) A cable television system to which paragraph (b) of this section applies may continue to carry television broadcast signals after expiration of the period specified therein, if an application for certificate is filed at least thirty (30)

days prior to the date on which a certificate would otherwise be required and the Commission has not acted on the application.

(d) A certificate of compliance that is granted pursuant to this section shall be valid until the unamended expiration date of the franchise under which the certificated cable television system is operating or will operate, unless the Commission otherwise orders. A cable system may continue to carry television broadcast signals after the expiration of its certificate, if an application for a new certificate is filed at least thirty (30) days prior to the expiration date of the existing certificate and the Commission has not acted on the application.

[§ *76.11(a) amended eff. 11-26-75; III(72)—7*]

§ 76.13 Filing of applications.

No standard form is prescribed in connection with the filing of an application for a certificate of compliance; however, three (3) copies of the following information must be provided:

(a) For a cable television system not operational prior to March 31, 1972 (other than systems that were authorized to carry one or more television signals prior to March 31, 1972, but did not commence such carriage prior to that date), an application for certificate of compliance shall include:

(1) The name and mailing address of the operator of the proposed system, community and area to be served, television signals to be carried (other than those permitted to be carried pursuant to §76.61(b)(2)(ii) or §76.63(a) (as it related to §76.61(b)(2)(ii)), proposed date on which cable operations will commence, and, if applicable, a statement that microwave radio facilities are to be used to relay one or more signals;

(2) A copy of FCC Form 325, "Annual Report of Cable Television Systems," supplying the information requested as though the cable system were already in opeation as proposed;

(3) A copy of the franchise, license, permit, or certificate granted to construct and operate a cable television system;

* * *

Subpart C — Federal-State/Local Regulatory Relationships

§ 76.31 Franchise standards.

(a) In order to obtain a certificate of compliance, a proposed or existing cable television system shall have a franchise or other appropriate authorization that contains recitations and provisions consistent with the following requirements:

(1) The franchisee's legal, character, financial, technical, and other qualifications, and the adequacy and feasibility of its construction arrangements, have been approved by the franchising authority as part of a full public proceeding affording due process;

(2) The franchisee shall accomplish significant construction within one (1) year after receiving Commission certification, and shall thereafter reasonably make cable service available to a substantial percentage of its franchise area each year, such percentage to be determined by the franchising authority; *Provided, however,* That where a franchise contains a policy of construction requiring less than complete wiring of the franchise area, such policy shall be adopted only after a full public proceeding (as contemplated by paragraph (a)(1) of this section) which includes specific notice of the consideration of such a policy.

NOTE: The proviso to this paragraph is applicable only to franchises granted after August 1, 1975.

(3) The initial franchise period shall not exceed fifteen (15) years, and any renewal franchise period shall be of reasonable duration;

(4) The franchising authority has specified or approved the initial rates that the frnchisee charges subscribers for installation of equipment and regular subscriber services. No increases in rates charged to subscribers shall be made except as authorized by the franchising authority after an appropriate public proceeding affording due process;

(5) The franchise shall: (i) Specify that procedures have been adopted by the franchisee and franchisor for the investigation and resolution of all complaints regarding cable television operations; (ii) require that the franchisee maintain a local business office or agent for these purposes; (iii) designate by title, the office or official of the franchising authority that has primary responsibility for the continuing administration of the franchise and implementation of complaint procedures; and (iv) specify that notice of the procedures for reporting and resolving complaints will be given to each subscriber at the time of initial subscription to the cable system.

NOTE: Subparagraphs (iii) and (iv) of this paragraph are applicable only to franchises granted after August 1, 1975.

(6) Any modifications of the provisions of this section resulting from amendment by the Commission shall be incorporated into the franchise within one (1) year of adoption of the modification, or at the time of franchise renewal, whichever occurs first. *Provided, however,* That, in an application for certificate of compliance, consistency with these requirements shall not be expected of a cable television system that was in operation prior to March 31, 1972, until the end of its current franchise period, or March 31, 1977, whichever occurs first; *And provided, further,* That on a petition filed pursuant to § 76.7, in connection with an application for certificate of compliance, the Commission may waive consistency with these requirements for

a cable system that was not in operation prior to March 31, 1972, and that, relying on an existing franchise, made a significant financial investment or entered into binding contractual agreements prior to March 31, 1972, until the end of its current franchise period, or March 31, 1977, whichever comes first.

(b) The franchise fee shall be reasonable (e.g., in the range of 3-5 percent of the franchisee's gross subscriber revenues per year from cable television operations in the community (including all forms of consideration, such as initial lump sum payments)). If the franchise fee exceeds 3 percent of such revenues, the cable television system shall not receive Commission certification until the reasonableness of the fee is approved by the Commission on showings, by the franchisee, that it will not interfere with the effectuation of Federal regulatory goals in the field of cable television, and, by the franchising authority, that it is appropriate in light of the planned local regulatory program. The provisions of this paragraph shall not be effective with respect to a cable television system that was in operation prior to March 31, 1972, until the end of its current franchise period, or March 31, 1977, whichever occurs first.

[§ *76.31(a)(2) and (5) amended eff. 8-1-75; III(72)—6*]

No. 76-495

In the Supreme Court of the United States

OCTOBER TERM, 1976

KAKE-TV AND RADIO, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 537 F. 2d 1121. The memorandum opinion and order of the Federal Communications Commission (Pet. App. 6a-16a) are reported at 54 F.C.C. 2d 173.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 1976. The petition for a writ of certiorari was filed on October 7, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Communications Commission properly applied its cable television (CATV) regulatory policies when it issued a certificate of compliance to a CATV operator franchised by a city, upon concluding that

the franchise was valid on its face and that certain alleged violations of state law in issuance of the franchise were outside the scope of its review of state franchise actions.

STATEMENT

The federal regulatory scheme for cable television (CATV) involves full and preemptive federal regulation in some areas and substantial deference to state and local authorities in other areas. *Cable Television Report and Order,* 36 F.C.C. 2d 143, 207-210; *Clarification of Cable Television Rules,* 46 F.C.C. 2d 175, 188-189. The Federal Communications Commission issues certificates of compliance to CATV systems. An applicant for a certificate must demonstrate compliance with federal rules for CATV operations, such as those governing signal carriage and access channels. However, the Commission has left to the States the initial decisions whether to allow cable televison at all and which operator to select. *Clarification of Cable Television Rules, supra,* 46 F.C.C. 2d at 189.

The Commission's review of state authorizations, which are often in the form of a franchise, is limited. The Commission examines an applicant's representations concerning the validity of its local authorization and the comments of interested parties only to determine if the proposed operations have been authorized by local law pursuant to the minimum procedural steps the Commission requires. *Id.* at 190. This case arises out of proceedings in Kansas leading to the grant of a CATV franchise and the Commission's determination that the franchise is valid.

On September 20, 1966, the City of Wichita, Kansas, adopted Ordinance 28-882, which set forth requirements for obtaining a cable franchise. AirCapital Cablevision, Inc., and three other companies applied for franchises. While these applications were pending, Community TV

of Wichita, Inc., filed suit seeking to have Ordinance 28-882 declared invalid. The Kansas trial court upheld Wichita's authority to pass the ordinance and grant a franchise, but found two provisions of the ordinance to be invalid. Community TV appealed this decision to the Kansas Supreme Court. *Community Antenna TV of Wichita* v. *City of Wichita,* 205 Kan. 537, 471 P. 2d 360.

During the pendency of the appeal, the City of Wichita enacted Ordinance 30-413, granting a CATV franchise to AirCapital, effective April 5, 1969. The Kansas Supreme Court subsequently ruled that Ordinance 28-882 was void in its entirety because it unlawfully interfered with private business affairs. *Community Antenna TV of Wichita* v. *City of Wichita, supra.* Wichita therefore repealed Ordinance 28-882, but it did not repeal Ordinance 30-413 since it had not been at issue in the appeal. *KAKE-TV and Radio, Inc.* v. *City of Wichita,* 213 Kan. 537, 538, 516 P. 2d 929, 930.

In conjunction with its repeal of Ordinance 28-882, the City of Wichita began proceedings to amend Ordinance 30-413. Community TV attempted to have the city held in contempt of the court's mandate due to its proceedings to amend Ordinance 30-413, but the trial court dismissed the contempt citation. Wichita then moved to have the trial court rule that passage of the proposed amending ordinance would not violate the court's mandate. The trial court denied this motion, and Wichita appealed to the Kansas Supreme Court on December 18, 1970. *Community Antenna TV of Wichita* v. *City of Wichita,* 209 Kan. 191, 193, 495 P. 2d 939, 940.

While the latter appeal was pending, the Kansas legislature authorized cities to grant cable franchises and ratified all existing ordinances purporting to authorize CATV service. Kansas Stat. Ann., 12-2001 *et seq.* (1964). The Federal Communications Commission also

adopted while the appeal was pending its comprehensive CATV regulations. *Cable Television Report and Order, supra.* As a result of these developments, the Kansas Supreme Court vacated its decision in the first appeal and upheld the original trial court ruling that Ordinance 28-882 was valid. *Community Antenna TV of Wichita, Inc.* v. *City of Wichita,* 209 Kan. 191, 495 P. 2d 939.

Following this decision, the City of Wichita, on August 29, 1972, adopted Ordinance 32-325, which amended Ordinance 30-413. AirCapital thereafter accepted the franchise offered by Wichita and applied to the Commission in October 1972 for a certificate of compliance (see Pet. App. 16a).

On November 22, 1972, KAKE-TV filed suit in the Kansas courts seeking a judgment declaring Ordinance 32-325 invalid. The trial court held that the ordinance was valid on its face and dismissed the action on the ground that KAKE-TV lacked standing to raise the issue. On December 8, 1973, the Kansas Supreme Court affirmed the trial court's dismissal for want of standing. It held that (1), under state law, a franchise granted by a city is not subject to collateral attack by a private party absent a showing that such party has a special interest or suffers some peculiar injury distinct from that of citizens generally, and (2) KAKE-TV had not established either special interest in the subject matter of the challenged franchise or peculiar injury. At the same time, the court noted that KAKE-TV had interposed objections to AirCapital's franchise in the pending Commission proceedings on AirCapital's application for a certificate of compliance and it assumed that those objections would be given "due consideration." *KAKE-TV and Radio, Inc.* v. *City of Wichita, supra.*

KAKE-TV previously had filed a petition requesting the Commission to deny AirCapital's application for a certificate of compliance on the ground that AirCapital's

franchise was invalid under Kansas law. The crux of its objection was that a city in Kansas may not issue a cable franchise unless it has enacted both an ordinance granting the franchise and an ordinance authorizing the city to grant franchises, and that the Wichita ordinances granting the franchise had not been enacted pursuant to a valid enabling ordinance.[1] AirCapital and the City of Wichita opposed KAKE-TV's petition (Pet. App. 10a, 12a).

The Commission denied KAKE-TV's petition and granted AirCapital a certificate of compliance (Pet. App. 6a-13a). With respect to the validity of AirCapital's franchise, the Commission reiterated its policy of not considering disputes involving local law and determined that the following factors provided sufficient evidence of the franchise's validity for Commission purposes: (1) Ordinance 30-413 had never been the subject of litigation; (2) the City of Wichita had taken the position that the Ordinance was valid; and (3) the Kansas legislature had enacted legislation validating all pre-existing ordinances or franchises (Pet. App. 10a-11a).[2]

The court of appeals unanimously affirmed the Commission's decision (Pet. App. 1a-5a). The court held that the Commission had developed fully the facts relevant to determining compliance with the limited federal requirements on the franchising process, and that the

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[1]KAKE-TV also claimed that AirCapital had received its franchise as the highest bidder and that such criterion was unlawful under Kansas law. Further, it questioned the effective date of AirCapital's franchise, assuming that there was a valid franchise (Pet. App. 9a).

[2]The Commission also ruled that the franchise was in substantial compliance with the Commission's regulations of franchise fees and was not in violation of its cross-ownership rules (Pet. App. 10a, 12a).

Commission properly had refused to decide KAKE-TV's claims under state law. The court noted that if there were some defect in the franchise not revealed in the filings before the Commission, the Kansas courts, and not the Commission, were the proper forum to resolve the issue (Pet. App. 4a-5a).

ARGUMENT

The court of appeals' decision is correct, does not conflict with other judicial decisions, and presents no issue of general importance warranting review by this Court.

Petitioner contends that the federal interest in maintaining a uniform national cable television policy will be jeopardized unless the Commission is required to decide whether the award of a franchise to AirCapital by the City of Wichita was valid under Kansas law. This argument is based on a misunderstanding of the Commission's dual jurisdiction policy.

That policy leaves to the discretion of state and local authorities the decisions whether and how to authorize local CATV operations—provided certain minimum federal guidelines, such as public participation in the granting process, are satisfied. The Commission also leaves to local authorities the selection of franchisees and enforcement of franchise provisions and consistently has refused to consider issues of state law governing cable franchising.[3] Absent extraordinary circumstances, such as evi-

[3] *General Communications & Entertainment, Inc.*, 41 F.C.C. 2d 501, rehearing denied, 45 F.C.C. 2d 309; see also *Metropolitan Cablevision Corp.*, 34 P & F Radio Reg. 2d 1159; *Blue Ridge Cable Television, Inc.*, 34 P & F Radio Reg. 2d 1423.

Petitioner cites *Pottsville Broadcasting Co.* v. *Federal Communications Commission*, 98 F. 2d 288 (C.A. D.C.), and two decisions of the Commission for the proposition that the Commission has a practice of interpreting state law (Pet. 14). None of the cases relied upon by petitioner supports the proposition. Those cases, in any event, deal with broadcast licenses, over which the Commission has plenary and exclusive regulatory authority—which it does not have with respect to CATV operations.

dence that the franchise was obtained through fraud or corruption, the Commission presumes that franchises issued by state or local authorities conform to state law and are the result of regular official action. This policy is consistent with the Commission's regulatory authority over CATV operations. See *United States* v. *Midwest Video Corp.*, 406 U.S. 649.

The Commission's application of that presumption in the present case was strongly supported by the facts the Commission found. No Kansas judicial opinion, legislative enactment or administrative ruling has invalidated the City of Wichita's ordinance granting a CATV franchise to AirCapital (Pet. App. 10a). In 1972 the Kansas legislature validated all pre-existing franchises and enabling ordinances (Pet. App. 11a). Moreover, the City of Wichita, the local governmental entity immediately involved, formally advised the Commission that the franchise is valid (Pet. App. 10a).

In these circumstances, and absent persuasive contrary evidence, the Commission was entitled to apply its normal presumptions of official regularity and lawfulness. As the court of appeals observed, the record before the Commission revealed no defect in the franchise and the Commission's treatment of state law was adequate and fair (Pet. App. 4a).

Petitioner contends that the Commission nevertheless was obliged to rule upon the validity of the franchise because the Commission is "the only forum in which

that question can be determined" (Pet. 13). The Commission is not the only such forum. As the court of appeals noted, "the matter can be decided in the Kansas courts between the proper parties" (Pet. App. 4a-5a).

Finally, the decision below is consistent with the decision of the District of Columbia Circuit in *Teleprompter Cable Systems, Inc.* v. *Federal Communications Commission*, No. 75-1582, decided August 26, 1976. In *Teleprompter*, a franchisee had bribed city officials in order to obtain a franchise and the Commission consequently refused to grant the franchisee a certificate of compliance. The court recognized the limited nature of the Commission's general policy in this area, which it described as the "normal standard of non-review" of local franchising decisions (slip op. 9, 12, 15). But it upheld the Commission's authority to consider the validity of a franchise when confronted with evidence of corruption or fraud in the franchising process (*id.* at 9, 13). Thus, despite petitioner's assertion that *Teleprompter* "is in conceptual conflict" with the decision below (Pet. 10), the present case involves simply the application of the Commission's general standard of non-review whereas *Teleprompter* was within the exception to that standard for circumstances involving fraud and corruption.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1976.

DOJ-1976-12

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-495

KAKE-TV AND RADIO, INC.,
Petitioner,

vs.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION,
Respondents,

AIRCAPITAL CABLEVISION, INC. AND THE CITY OF WICHITA, KANSAS,
Intervenors.

BRIEF OF INTERVENOR, AIRCAPITAL CABLEVISION, INC. IN OPPOSITION TO PETITION FOR CERTIORARI

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OPINIONS BELOW

The opinion of the Court of Appeals is reported in 537 F.2d 1121 (10 Cir.), and that of the Federal Communications Commission is reported in 54 F.C.C.2d 173.

QUESTION PRESENTED

The question presented is more accurately stated as follows:

Where a cable television franchise contract, adopted by a City after extensive public hearings, is valid on its face, and complies with applicable federal regulations, must the Federal Communications Commission then adjudicate the validity of the franchise contract under local state law when requested by one whose interest is insufficient to give it standing to sue in state courts, particularly when the alleged state law issue is frivolous?

STATEMENT OF THE CASE

On February 4, 1969, the City of Wichita, Kansas, awarded a non-exclusive cable television franchise, identified as Ordinance No. 30-413, to AirCapital Cablevision, Inc. The award was preceded by extended public hearings, and competing applications from three other companies. (R. 122). (Petitioner was *not* an applicant.) AirCapital's franchise incorporated by reference, as part of its terms, the provisions contained in an earlier general ordinance, No. 28-882. In view of ensuing legal developments, AirCapital's 1969 franchise was amended on October 3, 1972. (R. 23, 38, 133). AirCapital then applied to the Federal Communications Commission for a Certificate of Compliance.

After the 1969 franchise to AirCapital, none of the competing applicants contested the award in any forum, nor did any of the applicants object to issuance by the FCC of a certificate of compliance to AirCapital. Only petitioner, a television station in Wichita, Kansas, instituted

proceedings in state court attacking the validity of AirCapital's franchise, and objected before the FCC. After the Kansas Supreme Court later held that KAKE lacked standing to litigate the validity of AirCapital's franchise (213 Kan. 537, 516 P.2d 929), KAKE asked the FCC to adjudicate the validity of the franchise contract under the local law of Kansas.

Among the theories advanced by KAKE was the assertion that other litigation between other parties, which ultimately upheld the right of cities in Kansas to grant CATV franchises, somehow invalidated AirCapital's franchise. This precariously structured argument was based on two Kansas Supreme Court decisions made in successive appeals in the same action, *Community Antenna TV of Wichita, Inc.* v. *City of Wichita*, 205 Kan. 537, 471 P.2d 360 (1970), second appeal, 209 Kan. 191, 495 P.2d 939 (1972). (R. 199-215). In the first *Community* appeal, the state district court had upheld the validity of Wichita's general franchise ordinance, No. 28-882, except for two severable sections; but the Kansas Supreme Court held it entirely invalid on the ground that CATV was not "affected with a public interest". In the second *Community* appeal, the Kansas Supreme Court reversed itself and found that the state district court was right the first time in upholding the right of Wichita to enact its general franchise ordinance, No. 28-882, except for the two severable sections.

AirCapital was not a party to that litigation, and its franchise ordinance was not in issue.

After the first *Community* decision in 1970, the City decided, for procedural reasons, to repeal its general ordinance, No. 28-882, in preparation for enacting a revised general ordinance. But it did not attempt to repeal AirCapital's franchise. Among the terms of this franchise-contract were provisions also found in ordinance No. 28-

882. These were the provisions upheld as valid in the second *Community* appeal decision in 1972.

KAKE-TV also contended that AirCapital was awarded its franchise because it was the highest bidder. (R. 206). Its claim has grown bolder in this Court, wherein its petition erroneously states:

> "In two successive opinions, the Kansas State Supreme Court itself held that the award of a franchise to AirCapital contravened the Kansas State Constitution because the selection process was predicated solely upon a grant to the highest bidder." (Petition, p. 16).

Although the petition fails to cite cases supporting that statement, the reference is to the two *Community* appeals to which AirCapital was not a party, and in which AirCapital's franchise was neither involved nor a part of the Record. The *Community* opinions merely contain casual statements that the City's franchise award was made to the highest bidder, based entirely on an erroneous recitation in Community's oral argument in the Kansas Supreme Court. (205 Kan. at p. 539, 471 P.2d at 362—"It was stated by plaintiff in oral argument . . .").

The Record in this case establishes without dispute that an independent consulting firm, in analyzing the four bids, advised the City that, *while AirCapital's bid was not the highest bid,* it was "best so far as the public interest and citizens of this city" are concerned. (R. 171; 122).[1] Significantly, a letter to the FCC from the same counsel representing *Community* in Kansas appeals I and II, did not even suggest that AirCapital had been the high bidder. (R. 186).

1. The state court record on appeal in KAKE's action against AirCapital was filed with the FCC. Pages 73-86 of that record contains an exhaustive analysis of the bids. At least one bid was higher than AirCapital's.

It is not true, as petitioner asserts, that the Kansas Supreme Court "referred the question of the validity and effective date of the most recent franchise to the Federal Communications Commission." (Petition, p. 4). After holding that KAKE had no standing to maintain the action against AirCapital, 213 Kan. at 546, 516 P.2d at 935, the court referred to the oral arguments before it which had mentioned the pending FCC proceedings, and stated: ". . . we are satisfied that KAKE's complaints will be well and fully aired at the hearing and will be given due attention." The statement was nothing more than an indication of its confidence that federal regulations would be properly applied by the federal agency, a confidence which was ultimately justified by the careful consideration given by the FCC to the contentions before it.

The Commission, in granting AirCapital a certificate of compliance, rejected KAKE's claims that AirCapital's 1969 franchise did not comply with the provisions of 47 C.F.R. Sec. 76.31. The franchise complied with all provisions of that rule except the franchise fee limitation. Commission "grandfather" rules and precedent permitted such deviations for franchises issued before the new rules became effective, so long as the franchise was amended to reduce the fee to the prescribed limit by March 31, 1977. Both the City and AirCapital had already agreed to this requirement. (R. 236-243).

In a complete and well-considered opinion based upon an extensive record including submissions by all parties, the FCC rejected KAKE's contentions that AirCapital's 1969 franchise was not valid, and its contention that the franchise was granted to the highest bidder:

> "At the outset we wish to emphasize that our stated position is to avoid becoming embroiled in the interpretation of state and local laws. However, we

do not believe we should 'freeze' cable development where a local dispute over the operative date of a franchise is unresolved. We are persuaded that the franchise issued AirCapital on February 4, 1969, is valid." (R. 239).

The Court of Appeals approved the careful consideration given by the Commission to the issues before it, and affirmed the Commission decision. It gave short shrift to the specious and unfounded contentions made by KAKE:

> "KAKE argues that the fee to the City provided in the franchise was too high to permit substantial compliance. This, however, we view to be a matter within the discretion of the Commission. The record shows that the interested parties planned a downward revision, and also a review in 1977. We also find no merit in the crossownership issue advanced by those contesting the application, nor of the 'highest bidder' objection." (537 F.2d at 1122-1123).

ARGUMENT

The Federal Communications Commission Properly Granted AirCapital a Certificate of Compliance for Cable Television Operations Based Upon a Franchise Ordinance Duly Adopted by the City After Extensive Public Hearings.

The Petition for Certiorari should be denied for several reasons.

First, the Court of Appeals properly held that, once the FCC exercised its duty of testing the franchise provisions against the requirements of federal law, the Commis-

sion could not be turned into a judicial forum for litigation of local common law questions involving validity of a local franchise. The Court of Appeals' decision is not in conflict with the decision of any other court in the nation, but is rather consistent with this Court's decisions.

Second, petitioner did not raise before the FCC nor does it raise in this Court any substantial issue of state law which it contends should have been decided by the FCC.

1. The Court of Appeals Properly Held That, Once the FCC Exercised Its Duty of Determining Whether the Franchise Complied With Federal Regulations, the FCC Could Not Be Turned Into a Common Law Court to Litigate Local Law.

It is settled that the Commission's policy of leaving the grant of CATV franchises to local government in the first instance, subject to compliance with federal regulations,[2] is lawful and proper. *TV Pix, Inc.* v. *Taylor*, 304 F. Supp. 459 (3 judge court, D. Nev.), affirmed without opinion, 396 U.S. 556 (1970).

Federal requirements concerning CATV franchises are listed in 47 C.F.R. 76.31. (A. 19a). KAKE fails to point out any provision in the AirCapital 1969 franchise, as amended, which is inconsistent with the requirements there listed.

Apparently, KAKE contends that the AirCapital 1969 franchise is invalid under state law because AirCapital was the highest bidder. Thus, KAKE would have the Commission go beyond its prescribed role of applying and

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2. See United States v. Southwestern Cable Co., 392 U.S. 157, 20 L.Ed.2d 100 (1968).

enforcing federal law, to that of adjudicating local state law questions from the fifty states, in situations wherein direct competitors or others having standing to sue in state courts chose not to contest the validity of a franchise in local courts.

It is, of course, elementary that a CATV franchise, duly accepted by the franchisee, is a contract whose validity is governed by state law. McQuillin, *Municipal Corporations*, § 21.16; *City of Liberal* v. *Teleprompter Cable Service, Inc.*, 218 Kan. 289, 544 P.2d 330 (1975). Since 1969, the City of Wichita and AirCapital, therefore, have been parties to a contract which both recognize as binding. Its validity has not been challenged in the Kansas courts by any of the competing applicants, nor by anyone with sufficient legal interest to give it standing to sue. The franchise is valid on its face.

Yet, KAKE would have the Commission require the parties to litigate the validity of the franchise under state law, even where, as here, one party to the contract, the City of Wichita, was neither an intervenor nor a party. If KAKE's contention were ever to become law, it would require every federal and state administrative agency having responsibility for regulation of contracts in various publicly affected areas to adjudicate the validity of each contract it regulated. In those instances, the administrative agencies would, on request, be transformed into common law courts. The result is so contrary to settled notions of administrative and judicial power, so unworkable, and so unnecessary, that KAKE's contention cannot be taken seriously.

The Court of Appeals was manifestly correct in holding that "It is not the function of the F.C.C. to provide a forum to litigate such an issue, and furthermore, the Commission is not a tribunal equipped to do so. See

Eagle Broadcasting Co. v. *FCC*, 169 U.S. App. D.C. 16, 514 F.2d 852, and *Committee* v. *FCC*, 537 F.2d at 1123 (D.C. Cir.)."[3]

KAKE claims a "conceptual conflict" with the decision in *Teleprompter Cable Systems, Inc.* v. *FCC*, No. 1582, ... F.2d ..... (D.C. Cir., Aug. 26, 1976). The latter decision merely indicated that the due process requirement of 47 C.F.R. § 76.31 might permit the FCC to deny a certificate of compliance when the local franchise was obtained by corrupt practices. The due process requirement is one of federal law, as contrasted with the instant case in which KAKE seeks a determination of state law.

There is not the slightest evidence or claim that AirCapital received its franchise by corrupt practices. There was no violation of the federal due process requirement. The Commission's finding that the franchise complied with federal requirements constitutes a finding that the due process requirement itself was met. The ample evidence of spirited public hearings, competitive proposals, and in-depth study of those proposals, before the franchise was awarded, supports the Commission decision. The suggestion that claimed invalidity of a franchise contract under local law violates the federal due process requirement is too specious to require a response.

The decision below is in accord with the prior decision of this Court in *Regents of Georgia* v. *Carroll*, 338 U.S.

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3. The cases cited by KAKE for the proposition that the FCC has considered state law questions previously (Petition, p. 14), do not support the statement, and are clearly distinguishable. They do not involve the question here presented. Rather, the Commission has consistently followed the policy which it applied in this case. General Communications and Entertainment Co., Inc., 41 F.C.C.2d 501, recon. denied, 45 F.C.C.2d 309 (1973); Paxton Community Antenna System, Inc., 38 F.C.C.2d 904 (1972); Cablevision Service, Inc., 30 P & F Radio Regulation 2d 1153, 1154 (1974); Aberdeen Cable TV Service, Inc., 20 F.C.C.2d 475 (1969), recon. denied, 22 F.C.C.2d 239 (1970).

586, 94 L.Ed. 363 (1950). After discussing principles of administrative law as related to contracts whose validity is governed by state law, it was held:

> ". . . We do not read the Communications Act to give authority to the Commission to determine the validity of contracts between licensees and others." (338 U.S. at 602, 94 L.Ed. at 375-376).

By the same token, the Commission has no authority to determine the validity of the franchise contract between a CATV applicant, and the City of Wichita. Its authority is limited to the application of federal law to the terms of the existing franchise.

It is apparent, therefore, that the Commission could not have adjudicated the validity of the franchise under state law. No ruling it might have made on that issue, which was beyond its authority, could have been binding on state courts in Kansas. *Regents of Georgia* v. *Carroll, supra.*

This was, indeed, the position initially taken by petitioner before the FCC, when it stated:

> ". . . There is absolutely no question that the validity of AirCapital's franchise under the Kansas statutes and Constitution is a purely local issue. This is not a case in which the non-communications questions give rise to or is the basis of larger questions within the ambit of the Commission's jurisdiction under the Communications Act. . . . Rather, in this case, the issue, is a matter of purely local concern determinable solely by reference to state law and state precedent." (R. 71).

Thus, there exists no legal vacuum of any sort as a result of the Commission's consistent position on this issue.

The lack of a state court ruling on the validity of AirCapital's franchise results only from the fact that those parties who had standing to challenge its validity chose not to do so. Their decision not to do so very likely resulted from their own belief that it was valid. Whatever the reason, it remains clear that the Commission acted properly in refusing to adjudicate issues of local law.

2. Petitioner Fails to Raise Any Substantial Issue of State Law.

As noted, KAKE was not one of the four applicants for a CATV franchise in the City of Wichita, Kansas, and is apparently not interested in obtaining the benefits of cable television in its own telecasting area. Thus, after failing in its state court effort attacking AirCapital's franchise, KAKE shifted its efforts to the FCC compliance proceeding. KAKE there made several contentions, not one of which it supported with any substantive fact, and all of which were without merit as demonstrated by undisputed facts of record.

KAKE contended before the FCC that the City awarded AirCapital's franchise on the basis of being the highest bidder in violation of state law; that the franchise was enacted without proper notice or hearings, and without consideration of the legal, technical and other qualifications of the applicant.

It appeared without dispute that AirCapital's 1969 franchise was awarded only after spirited public hearings over a period of time, and that all four applicants' CATV proposals were the subject of serious studies, including analyses by independent consultants.

Thus, in this Court, KAKE confines its claim concerning state law to the contention that the FCC should have

made a specific finding as to whether AirCapital's franchise was invalid on the ground that it was awarded on the basis of AirCapital being the highest bidder. In doing so, KAKE fails to point to a single fact in the Record below remotely supporting its claim; and fails to refer this Court to the facts in the Record which conclusively establish that AirCapital's franchise was not awarded on the basis of being the highest bidder.

Rather, KAKE relies only on an inadvertent, erroneous statement by the Kansas Supreme Court in litigation to which AirCapital was not a party, and in which its franchise was not in issue, as we demonstrated in our Statement of the Case, *supra*.

For these reasons, the alleged local law "high bidder" contention was frivolous and without substance. As the Court of Appeals stated, "We also find no merit in . . . the 'highest bidder' objection." (537 F.2d at 1123).

Insofar as the FCC considered the amount of AirCapital's franchise fee, and its regulations in regard thereto, the FCC properly applied its rules by holding that the franchise fee must be reduced to 3% by March 31, 1977, and correctly observed that the City and AirCapital had already formally agreed to that reduction. (R. 240).

The Petition for Certiorari, therefore, does not raise a substantial issue of state law, even assuming for this purpose that federal agencies could be transformed into common law courts. The petition should, for this additional reason, be denied.

CONCLUSION

The issue presented by petitioner is neither novel nor substantial. Petitioner would have this Court overturn the settled law governing regulatory powers of administrative agencies by requiring them to decide the validity of local franchise contracts under the laws of our fifty states.

Petitioner has failed to submit any rational ground or legal basis for requiring the FCC to adjudicate the validity of AirCapital's franchise. And petitioner's claim of invalidity under state law itself lacks any substance because the Record demonstrates that AirCapital was not awarded its franchise on the basis of being the highest bidder. Hence, it would be a useless formality to consider the question presented in the Petition for Certiorari.

The Petition should be denied.

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BRIEF IN OPPOSITION BY INTERVENOR, THE CITY OF WICHITA, KANSAS

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BRIEF IN OPPOSITION BY INTERVENOR, THE CITY OF WICHITA, KANSAS

The City of Wichita, Kansas, was not a party to the CATV compliance proceeding before the Federal Communications Commission, but did intervene in the Court of Appeals on KAKE's Petition to Review the Commission grant of a certificate of compliance to AirCapital. However, the City did make known its view to the FCC that AirCapital's CATV franchise granted in 1969, and later amended, was unquestionably valid and that the grant of a certificate of compliance was in the best interests of the citizens of Wichita. (R. 121, 225).

We have had the opportunity to review the Brief in Opposition being filed by AirCapital. We give our

unqualified support to the statements and arguments there presented, and will not engage in needless repetition.

We do, however, wish to emphasize the important public interest supporting the FCC Order below which granted AirCapital the certificate of compliance. This public interest is in part reflected by the Kansas legislature's enactment of K.S.A. 12-2006, et seq. (enacted March 24, 1972), declaring that CATV service is affected with a public interest, empowering cities to regulate its activities to the extent that CATV operation affects local interests.

K.S.A. 12-2012, a part of the foregoing enactment, was intended to validate previously granted CATV franchises, because of the legal confusion theretofore existing on the point. That statute provides:

> "All ordinances and existing franchises purporting to authorize persons or entities to provide cable television service in said cities shall hereinafter be deemed to be authorized and operative under the provisions of this act."

Counsel for the City of Wichita and other municipalities had personally appeared before the Kansas Senate Committee prior to enactment of these statutes, and supported the legislation. The Committee was advised that Wichita had granted a franchise in 1969 to AirCapital. Thus, the legislature, in enacting the foregoing statutes, was fully aware that its action, in declaring existing franchises to be authorized and operative under the provisions of the Act, had the effect of recognizing as valid the very 1969 franchise which is the subject of this case.

We take note of KAKE's contention that the FCC should have decided, under state law, the question of whether AirCapital's franchise was valid if AirCapital

were the highest bidder among the four competing applicants for a franchise.

We do not deem it necessary to delineate the circumstances in which a franchise granted on the basis of a "high bid" may invalidate a franchise under Kansas law. We must agree with the FCC, and with the Court of Appeals, that it is not the function of the FCC as an administrative agency, having only those powers delegated to it under the Communications Act, to rule upon the validity of franchise-contracts under state law. *Regents of Georgia* v. *Carroll*, 338 U.S. 586, 602, 94 L.Ed. 363, 375-376 (1950).

Moreover, a city staff analysis of the competing bids, as well as a complete study by an independent private concern, revealed that, while AirCapital's proposal was not the highest bid, it was the best so far as the public interest and the citizens of Wichita were concerned. (R. 171). Although not a part of the printed Record here, the Commission Record included the filing of the Record on Appeal in *KAKE-TV and Radio, Inc.* v. *City of Wichita*, 213 Kan. 537, 516 P.2d 929, with the FCC in the proceeding below. An analysis of the various proposals dated November 26, 1968, commences on page 73 of that Record. No evidence in the form of affidavit or otherwise was presented to the contrary.

Thus, any assertion that AirCapital gained a franchise because it was the highest bidder is without support in fact. It is contrary to the facts, which are shown in the Record.

For these reasons, it becomes apparent that petitioner KAKE does not present any substantial question justifying review by this Court.

The Petition for Certiorari should be denied.

Respectfully submitted,

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